STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 10, 2001
v	No. 219702 Wayne Circuit Court
FRANK L. WALTON, Defendant-Appellant.	Criminal Division LC No. 98-010861

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant, who was charged with assault with intent to murder, was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and armed robbery, MCL 750.529; MSA 28.79. He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term of thirty to fifty years. Defendant appeals as of right. We affirm defendant's convictions but remand for resentencing.

Defendant first argues that the trial court erred when it refused to direct a verdict on the charge of assault with intent to murder and instead reduced the charged offense to assault with intent to commit great bodily harm less than murder because the evidence was not sufficient to support a finding that defendant had the intent to commit great bodily harm. We disagree.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Randolph*, 242 Mich App 417, 419; 619 NW2d 168 (2000). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Johnson, supra*. However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478 (1992), amended 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The jury may infer the defendant's specific intent from the circumstantial evidence. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983); *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986). The complainant testified that, as she reached defendant's

car, she leaned with her hands on the car's front passenger side and told defendant, who was in the driver's seat, to give back her purse. In response, defendant began to drive away, with the complainant holding onto the side mirror. According to the complainant, defendant drove away so quickly that she had no time to move out of the way, and, had she not shifted her body posture, defendant would have driven the car over her feet. The complainant further testified that defendant appeared as though he was intentionally trying to shake or knock her off the car, swerving her toward parked cars and driving "something like 50 or better" on residential streets. The complainant believed that defendant tried to kill her by three times swerving in an attempt to cause her to hit the parked cars. Defendant continued to pick up speed as he drove for a few more blocks before the complainant finally let go. Viewed in a light most favorable to the prosecution, the complainant's testimony was sufficient to enable a rationale trier of fact to find beyond a reasonable doubt that defendant intended to seriously harm the complainant. See *People v Mitchell*, 149 Mich App 36, 38; 385 NW2d 717 (1986) (the offense of assault with intent to do great bodily harm less than murder requires proof of an intent to do great bodily harm).

Defendant also argues that the trial court erroneously instructed the jury on the defense of alibi, the offense of armed robbery, and the issue of identification. We disagree. Viewed as a whole, the trial court adequately instructed the jury on the offense of armed robbery, and properly informed the jury of the requisite burden of proof with respect to the defenses of alibi and identification. *Randolph*, *supra* at 421; *People v Norris*, 236 Mich App 411; 600 NW2d 658 (1999).

Nor did the trial court err by not requiring the jury to decide whether they found that the "dangerous weapon" element of armed robbery was satisfied by defendant's use of the automobile or the complainant's testimony about observing "light glint off of something" in defendant's pocket that led her to believe that defendant was armed with a weapon. Whether or not the object was actually a weapon, the jury could have found that the complainant reasonably believed that defendant fashioned an article intended to lead her to believe that it was a weapon. MCL 750.529; MSA 28.797; *People v Gary Johnson*, 206 Mich App 122, 124; 520 NW2d 672 (1994). Further, the jury could have properly determined that the dangerous weapon element was satisfied based either on the presence of this object, or the car, and the trial court did not clearly err by not requiring the jury to come to a unanimous conclusion regarding the specific item. See *People v William Johnson*, 187 Mich App 621, 629; 468 NW2d 307 (1991).

Defendant also argues that the trial court erred in refusing to allow him to present evidence that the complainant was not afforded an opportunity to pick him out of a lineup, or to present evidence that other witnesses had been given an opportunity to pick him out of a lineup and failed to do so. Again, we disagree. Evidence regarding defendant's participation in lineups unrelated to this case would have been irrelevant and properly excluded. MRE 401; MRE 402. Further, contrary to defendant's assertion, the record indicates that defense counsel did, in fact, elicit testimony from the complainant that she was not afforded the opportunity to identify defendant in a pretrial lineup.

Defendant next argues that the prosecutor improperly argued that defendant was guilty of armed robbery on alternative theories because one of the theories, which was based on the

complainant's testimony regarding the "shiny object" in his pocket, was unsupported by the evidence. We disagree. The challenged theory was factually supported by the complainant's testimony that she saw defendant reach for something in his coat and then saw light glinting off an object that she thought was a weapon. As mentioned above, the jury properly could have found from this testimony that the "dangerous weapon" element of armed robbery was satisfied. *Gary Johnson, supra* at 124. Accordingly, the prosecutor's remarks were proper. Further, the prosecutor's comment that a witness was worthy of belief because the witness had no reason to lie was based on the evidence and, therefore, not improper. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).[1]

Finally, although consecutive sentencing was mandatory because defendant committed the current crimes while on parole, the trial court failed to order consecutive sentencing at the time of the sentencing hearing. The trial court acted improperly in amending sua sponte the judgment of sentence to reflect that the sentences imposed were to run consecutively to the sentence for which defendant was on parole when he committed the current crimes. *People v Nimeth,* 236 Mich App 616, 628; 601 NW2d 393 (1999); *People v Thomas*, 223 Mich App 9, 11; 566 NW2d 13 (1997). We therefore remand for resentencing.

Defendant's convictions are affirmed. We remand for resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] In light of our resolution of the foregoing issues, defendant's ineffective assistance of counsel issue must fail. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).